

(i) May pose a threat to the appointee or others;

(ii) May result in loss of or damage to Government property; or

(iii) May otherwise jeopardize legitimate Government interests.

(d) The following procedures must be observed when an agency invokes an exception to the 120-day restriction under paragraphs (c)(3) or (c)(4) of this section:

(1) The agency shall include in the notice the reasons for invoking the exception.

(2) The appointee shall be given a reasonable time, but no less than 7 days, to respond regarding the propriety of the use of the exception.

(3) The agency shall give the appointee a notice of decision on the propriety of the use of the exception at or before the time the action will be effective.

(4) When circumstances require immediate action, the agency may place the appointee in a nonduty status with pay for such time as necessary to effect the action.

(e) The imposition of the 120-day moratorium does not extend the probationary period.

[54 FR 18876, May 3, 1989, as amended at 57 FR 10125, Mar. 24, 1992]

§ 359.407 Appeals.

(a) Removal under § 359.402, 359.403, or 359.404 is not appealable to the Merit Systems Protection Board under 5 U.S.C. 7701.

(b) Removal under § 359.405 is appealable to the Merit Systems Protection Board under 5 U.S.C. 7701 as to whether the reduction in force complies with the competitive procedures required under 5 U.S.C. 3595(a).

Subpart E—Removal of Career Appointees for Less Than Fully Successful Executive Performance

§ 359.501 General.

(a) *Coverage.* (1) This subpart covers—

(i) A career appointee who has completed the probationary period in the SES; and

(ii) A career appointee who is not required to serve a probationary period in the SES.

(2) This subpart does not cover, however, a career appointee who is serving as a reemployed annuitant. See subpart I of this part for removal of a reemployed annuitant.

(b) *Definitions.*—(1) *Final rating* means the rating of record made by an appointing authority under the SES performance appraisal system in accordance with the requirements of 5 U.S.C. 4314(c)(3) and part 430, subpart C, of this chapter.

(2) A *less than fully successful* final rating means a rating of unsatisfactory or minimally satisfactory.

(c) *Optional removal from the SES.* The agency may remove a career appointee from the SES after the appointee has been given one final rating of unsatisfactory.

(d) *Mandatory removal from the SES.* The agency must remove a career appointee from the SES after—

(1) The appointee has been given two final ratings of unsatisfactory within 5 consecutive years; or

(2) The appointee has been given two final ratings of less than fully successful within 3 consecutive years.

§ 359.502 Procedures.

(a) *Notice.* The agency shall notify the career appointee in writing at least 30 calendar days before the effective date of the action. The notice shall advise the appointee of—

(1) The basis for the action;

(2) The appointee's placement rights under subpart G of this part—the position to which the appointee will be assigned shall be identified either in this advance notice or in a supplementary notice issued no later than 10 calendar days before the effective date of the action;

(3) The appointee's right to request an informal hearing from the Merit Systems Protection Board;

(4) The effective date of the removal action; and

(5) When applicable, the appointee's eligibility for immediate retirement under 5 U.S.C. 8336(h) or 8414(a).

(b) *Informal hearing.* (1) A career appointee being removed from the SES under this section shall, at least 15